

COMMENTS

**ADMINISTRATIVE CIVIL LIABILITY COMPLAINT NO. R5-2003-0524
VIRGINIA L. DRAKE, TRUSTEE, DRAKE REVOCABLE TRUST
HUMBOLDT ROAD BURN DUMP AREA 7
ASSESSORS PARCEL NUMBER 011-780-018**

AND

**ADMINISTRATIVE CIVIL LIABILITY COMPLAINT NO. R5-2003-0525
VIRGINIA L. DRAKE, TRUSTEE, DRAKE REVOCABLE TRUST
HUMBOLDT ROAD BURN DUMP AREA 8
ASSESSORS PARCEL NUMBER 011-780-014**

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October 24, 2005

VIA HAND DELIVERY

Thomas R. Pinkos, Executive Officer
California Regional Water Quality Control Board
11020 Sun Center Drive, #200
Rancho Cordova, CA 95670

To:
Pedri
10-26-05 11:30 IN

Re: Administrative Civil Liability Complaint No. R5-2005-0524 (Area 7-APN: 011-780-018)
Administrative Civil Liability Complaint No. R5-2005-0525 (Area 8-APN: 011-780-014)
Virginia L. Drake, Trustee, Drake Revocable Trust - Humboldt Road Burn Dump

Dear Mr. Pinkos:

I represent Virginia L. Drake, Trustee of the Drake Revocable Trust, and I am writing you in response to the two above-referenced Administrative Civil Liability Complaints and your related letters to Mrs. Drake dated September 23, 2005. I am submitting this letter, together with the Declarations of Virginia L. Drake and Kenneth R. Stone, Esq., and a Compendium of Relevant Documents, on behalf of Mrs. Drake in response to the ACL Complaints.

We strongly disagree with the fact that Mrs. Drake is the only Responsible Party under Cleanup and Abatement Order Nos. 88-700 and R5-2003-0707 who is being fined, and believe it is appropriate that your ACL Complaints should be modified to also include the City of Chico and the other property owners, James E. (Ed) Simmons and Darwin H. Simmons and Nina R. Simmons, Trustees of the Simmons Family Trust (collectively the "Simmonses") as also liable for any fines imposed under said complaints. We also believe the amounts of the fines should be reduced to something much closer to the minimum amount of liability allowed by statute. Our reasons are as follows.

Mrs. Drake does not deny at this point that the cleanup of the two parcels per the above-referenced CAOs has not come to pass as ordered by the Board. However, she is the only party who has stepped forward to take any action to remediate the contamination, and has done so in hopes that she could eventually persuade the other parties to cooperate and agree on a joint plan to conduct the cleanup. The City of Chico and the Simmonses are at the very least equally guilty of the violations identified in your ACL Complaints concerning the failures to obtain permits, to remove the waste in question, to pay invoices, submit technical reports, etc., and Mrs. Drake certainly contends that she has done far more than any of the others to investigate and remediate the contamination concerning her two properties. At no time has Mrs. Drake misled the Board staff into believing that she spoke for the Simmonses or had the authority to act on their behalf, and she is quite distressed at the contentions in the complaints claiming that she has done so. In

addition, as to the remediation of the waste contained in the soils of the stock pond levee on Area 8, the Board staff appears to have disregarded the clear evidence of the discharge caused by the City of Chico, and applicable law demonstrating the City of Chico is legally responsible, and therefore culpable, for this injury. In response, the City raises weak and non-applicable third-party contract defenses to its liability to Mrs. Drake, while statutory (CERCLA and other state laws) and California case law clearly provide that the City has liability to Mrs. Drake for the clean up of Area 8. Moreover, and again as to the stock pond waste, Ed Simmons has agreed in writing that, as between the owners, he is the sole party who is financially responsible for any injury or damage caused by his role in allowing the discharge. It is difficult to imagine more persuasive evidence of Ed Simmons' culpability.

Moreover, Mrs. Drake and her late husband, John Drake, played absolutely no role in the actual discharges in question. On the other hand, and as will be shown below, the other Responsible Parties have played a direct role in the discharges. Furthermore, no discharges took place in connection with the alleged violations under the ACL Complaints in question, and given the condition of the properties and their current state of non-use, the risk of a discharge in the future is not substantial.

Under these circumstances to select out Mrs. Drake for punishment, by fining her alone, collectively, in the amount of \$225,000.00, and allowing the other Responsible Parties to completely escape any responsibility, is an unfair, arbitrary and capricious act, based upon reasoning the record does not support. Furthermore, ratifying the actions of the City of Chico and the Simmonses by not fining them because they claim to have "relied" on Mrs. Drake's action as grounds for their own failures to take action would establish a very dangerous precedent and indeed would encourage others to violate future Board orders and undermine the Board's policy statements.

Lastly, the record supports fines much closer to the minimum statutory amounts, particularly since these are non-discharge violations and the alleged discharger is an individual with little or no culpability and no prior history of violations.

The Simmons Brothers.

Mrs. Drake and her late husband have a long history with Ed and Darwin Simmons. Since 1978 John Drake, and subsequently the Drake Revocable Trust, has co-owned with the Simmonses a large 7000 acre assemblage of land in the Chico area known as the Simmons Ranch. This assemblage includes the two properties in question - the Battery Breaker and Stock Pond Levee parcels. Generally speaking, things went well enough between the parties until Mr. Drake died in late 2001. After that, circumstances deteriorated to the point that Mrs. Drake recognized she could no longer jointly manage and own the various Simmons Ranch properties with the Simmons brothers.

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In March of 2003 Mrs. Drake filed a partition action in Butte County Superior Court.¹ Included within the scope of that action are the disputes concerning financial responsibility for the cleanup and remediation of the Battery Breaker and Stock Pond Levee parcels. While Mr. Drake was alive, he and Ed Simmons signed a series of agreements documenting Ed Simmons' sole involvement in and financial responsibility for allowing the City of Chico, through its agent, Baldwin Construction to dump, in late 1987, what was later discovered to be contaminated fill dirt on the Stock Pond Levee parcel and to then construct a stock pond for watering Mr. Simmons' horses. The parties agreed this was done without Mr. Drake's knowledge. The Settlement Agreement and Agreement² executed on June 2, 1994 and August 1, 1995, respectively, set forth these understandings.

Ed Simmons was willing to sign these agreements because he strongly believed (and apparently still believes) the City of Chico is liable for the cleanup of the discharge of its wastes on the Stock Pond Levee parcel. As discussed below, it is undisputed at this point that the contaminated fill dirt came from a construction project being conducted by the City of Chico referred to as the Bruce Road Extension (Area 2). However, since early 1988, the City of Chico has consistently maintained as its legal position that its contract with its contractor, Baldwin Construction, and a generic release drafted by City lawyers and signed by the unrepresented Ed Simmons, provide that the City of Chico bears no liability to Mrs. Drake for the discharge of the contaminated fill dirt on the Stock Pond Levee parcel. The City of Chico's position on this matter is strongly disputed by Mrs. Drake and the Simmonses (and Baldwin Construction, for that matter). Lastly, it is undisputed that John Drake and Ed Simmons did not learn of the contaminated condition of the soils until shortly after the stock pond levee had been constructed.

In any event, after Mr. Drake died in November of 2001 and the state renewed its interest in effectuating a cleanup of the two properties, Ed Simmons was no longer willing to abide by his earlier agreements and this was in no small part one of the reasons Mrs. Drake filed suit. There have been several mediations and court-ordered settlement conferences in the partition action, but no agreements have resulted. A trial date is set for February 16, 2006.

It is in this context that the contention, as claimed in the ACL Complaints, that in mid-2003 or early 2004, or anytime since then, that Mrs. Drake and the Simmonses would have agreed that Mrs. Drake was authorized to act on the Simmonses behalf, or that the Simmonses would have agreed to offer "full cost reimbursement" in connection with the cleanup, is particularly absurd. They were and still are fighting with each other and have not agreed on anything.

¹ Virginia L. Drake, Trustee, Drake Revocable Trust v. James Edward Simmons, et al., Butte County Superior Court case no. 129127.

² Copies of all documents referenced in this letter can be found in chronological order in the accompanying Compendium of Relevant Documents.

The words of the parties themselves are ample evidence of the state of affairs during this time frame. From the Simmonses: "[W]e . . . are unable to . . . be represented by you . . . in the cleanup."³ "I will never agree or permit Virginia L. Drake to represent me or my interests."⁴ "Virginia L. Drake has never represented our interests or even sought our approval with regard to the subject cleanup".⁵ As for Mrs. Drake: "I do not speak on behalf of any other property owners included in the cleanup and Abatement Order."⁶ Furthermore, and as is demonstrated by the Declarations of attorney Kenneth R. Stone, Mrs. Drake's counsel in the Partition Action and Mrs. Drake, there are no outstanding agreements concerning her authorization to act on behalf of the Simmonses in connection with the cleanup of the two parcels in question, nor any related financial agreements that the parties are willing to recognize at this point in time.

Moreover, nothing in the record supports the contention in the ACL Complaints that Mrs. Drake ever specifically stated in writing or verbally that she was authorized to act on the Simmonses behalf. Indeed, Mrs. Drake demands that the Board produce whatever evidence to the contrary that directly supports its proposition in this regard. To a certain extent my letter to the Simmonses' counsel in the Partition Action, Randall Nelson, Esq., dated September 10, 2004, has been mis-characterized as to its content and nature. This letter was not a notification of Mrs. Drake's intent to manage and obtain all necessary permits to cleanup Area 8 on the Simmonses behalf but rather a demand that the Simmonses cooperate with regard to specific elements of a joint plan to cleanup the properties and notice that if they failed to do so, the Drake Trust would take its own action.

"[W]e are demanding that your clients agree, in writing, to share in the cleanup costs that we anticipate will be incurred" "If your clients refuse to cooperate financially, then Mrs. Drake will be left with no alternative but to proceed on her own" "[A] prompt response is urgently needed" "If we have not received an affirmative response from you along the lines indicated above . . . we will proceed with the understanding that your clients do not intend to cooperate as we have requested."

Indeed, the record of correspondence between the Simmonses and Mrs. Drake is replete with notices by Mrs. Drake of the action that she is intending to take, and requests that the Simmonses cooperate financially with her. The fact remains that they have consistently refused to do so. To the extent that their financial ability to participate in the cleanup is concerned, the Declaration of

3 Ed Simmons' letter to Mrs. Drake dated February 24, 2004.

4 Ed Simmons' letter to K. Greg Peterson, Esq. dated September 15, 2004.

5 Darwin Simmons' letter to K. Greg Peterson, Esq. dated April 11, 2005 (emphasis added.)

6 Virginia L. Drake letter to City of Chico Mayor Maureen Kirk dated February 9, 2004.

Kenneth R. Stone establishes that the estimated value of the Simmonses interest in the Simmons Ranch Properties at issue in the Partition Action alone is believed to be approximately \$10,000,000.00. Certainly, if they had wished to do so, with assets like this, the Simmonses could easily have participated at least at the level that Mrs. Drake has up to this point in time, but again they have not shown any willingness to do so.

For these reasons, the claims that the Simmonses were "under the impression that Virginia Drake was in the drivers seat, at least till the last minute she jumped ship."⁷ as the basis for "why (the Simmonses) were idle regarding the cleanup order" ring particularly hollow and have to be viewed as nothing but last-minute, face-saving claims made in an attempt to avoid fines.

As a co-owner of both properties, Mrs. Drake was and is authorized under California law to take action to minimize her own liability concerning the cleanup, and her plan was to engage herself in this process and, hopefully with the assistance of the Board staff, to persuade the other Responsible Parties to join her in remediating that contamination. For a variety of reasons, that plan did not come to fruition. Why should she alone be the one to be punished for her efforts? Looking at this from another angle, if she truly was acting with the Simmonses authority, in effect as their agent, why should they not also be liable if she violated the Board's directives?

The Simmonses' claim⁸ that they agreed to pay anything towards a clean up was limited to Alternatives 1 & 2 under the RAP, after Mrs. Drake had already made it clear that she believed Alternative 3 was a better choice. In a way, this was a very safe choice since the Simmonses no doubt must have surmized that this would at least look to the Board like they were willing to do something. However, their words were not followed by any action or, more importantly, any funding, and this of course was not what Mrs. Drake had requested of them in the form of a joint effort, so no further action resulted on this very empty offer. Furthermore, as the letter from Darwin & Nina Simmons to me dated April 11, 2005 indicates, they did not actually intend to pay anything at the time to back up their promises. Not until after the Simmons Ranch properties have been sold through the partition action, which means some time in mid to late 2006 at the earliest would they commit themselves to spending any money. This of course is as unacceptable to Mrs. Drake as it would likely be to the Board. Mrs. Drake has already expended over \$186,000.00 of her own funds towards the development of a remediation plan for both parcels, and she got those plans as far as the permitting stage.

⁷ Darwin Simmons' letter to Thomas Pinkos dated July 15, 2005.

⁸ Darwin Simmons' letter to K. Greg Peterson, Esq. dated April 11, 2005.

City of Chico.

In late 1987 and early 1988, William J. Marshall, the Chief of the Waste Discharge to Land Unit of the Central Valley Regional Board, made the following observations concerning the Stock Pond Levee: "The construction of the surface impoundment (on the Stock Pond Levee parcel) involved the removal of 'hazardous wastes' from a former landfill site and the use of these wastes in the construction of a dike. The use of 'hazardous wastes' in this manner is probably a violation of state laws regulating the transportation and disposal of 'hazardous wastes'."⁹ "Because Baldwin Contracting Company, acting under contract to and apparently as agent for the City, discharged the waste materials, the City would be named as a Responsible Party in a cleanup and abatement order, along with the landowner."¹⁰ "[T]he removal of waste from the Bruce Road right-of-way (land owned by the City of Chico) and their emplacement in a dam for a stock pond on Assessor's Parcel No. (011-780-014) (land owned by Drake, et al.) was an illegal discharge and a threat to water quality."¹¹ Cleanup and Abate Order No. 88-700 was issued on January 27, 1988, and has never been rescinded.

In fact, it is undisputed that the lead-impacted soils came from City owned property and were excavated in connection with the Bruce Road extension.¹² However, the City of Chico has consistently taken the legal position that Baldwin Construction "acquired" the fill material from the Bruce Road extension, which obviously had to be disposed of as part of the City's project, and that the City of Chico has no legal responsibility for its discharge, "no involvement" in arranging for the disposal of the wastes and that this is a matter "strictly between" Ed Simmons and Baldwin Construction. Time and time again the City of Chico has repeated its mantra that there is "no evidence" showing that any City operation or activities caused the contamination of the Stock Pond Levee parcel.¹³ Attorney David Frank of the City of Chico even went so far in his letter as to contend that Baldwin Construction was the "sole owner of (the) contaminated soils" and that since there was "adequate funding already available" to cover the costs of remediation of the Stock Pond Levee parcel, this somehow operated as a further basis to insulate the City of Chico from any further involvement in the cleanup. In a subsequent letter, attorney

9 William J. Marshall letter to John D. Drake dated December 15, 1987 (emphasis added.)

10 William J. Marshall letter to Fred Davis, City Manager, City of Chico, dated January 6, 1988. (emphasis added.)

11 William J. Marshall letter to Fred Davis, City Manager, City of Chico and John Drake, dated January 27, 1988. (emphasis added.)

12 See also Section 3.4, et seq., statistical discrimination of berm material from native soils contained in the Remedial Design and Implementation Plan prepared by Risk-Based Decisions, Inc. dated February 15, 2005, (copy not included with Compendium of Relevant Documents.)

13 See letter of David Frank, Esq. to K. Greg Peterson, Esq. dated December 16, 2004, p. 2.

Frank again challenged the Board to produce evidence of the City of Chico's liability as a preliminary foundation for having to provide any technical reports.¹⁴ Attorney Frank went on in that same letter to make extensive legal arguments which he contends support the position of the City of Chico, but again the same were primarily based on contractual documentation surrounding the construction of the Bruce Road extension and the disposal of the surplus excavation material, before there was any record of anyone being aware that it was contaminated. Mr. Frank summarizes what happened in the following passage on page 3: "The contamination of the parcel resulted from an encapsulated event, i.e., a purely contractual relationship between Baldwin and Mr. Simmons, to meet Baldwin's apparent need for a home for the soil it owned as surplus to the needs of the road project and Mr. Simmons apparent need or desire for a pond for watering cattle."

First, it is worth pointing out that the record contains no reference to any release or agreements entered into between the Drakes and the City of Chico.

In any event, the City of Chico's arguments are without legal merit for the following reasons. "Any person who by contract, agreement, or otherwise, arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances" shall be liable. CERCLA section 9607(a)(3). It is recognized that CERCLA imposes strict liability without regard to causation or fault. See U.S. v. Monsanto Company (4th Cir. 1988) 858 F.2d 160, 167-168. (Finding a PRP subject to CERCLA liability whether or not it actually knew of a hazardous condition at the time the PRP had an interest in the property.) The Ninth Circuit, in Carson Harbor Village v. Unocal Corp. (9th Cir. 2000) 227 F.3d 1196, 1207, specifically stated "The trigger of liability under §9607(a)(2) is ownership or operation of a facility at the time of a disposal, not culpability or responsibility for the contamination." (emphasis added.) Under §9601(9) the term "facility" includes a landfill, specifically. "The owner of a facility can be held jointly and severally liable for costs of responding to a release that has occurred even if the owner was not responsible for the actual disposal." U.S. v. Atchison, Topeka & Santa Fe Railroad (E.D. Cal. 2003) 2003 U.S. Dist. LEXIS 23139 at 142 (emphasis added), see also Hanna Mining Co. (9th Cir. 1989) 882 F.2d 392, 395 (finding that "CERCLA explicitly imposes liability on current owners for hazardous substances dumped by previous owners.")

Concerning the City's attempts to transfer liability to the contractor, Baldwin Contracting, there is absolutely no support under CERCLA law for this. The statute states explicitly that no general hold harmless agreement or conveyance is effective to transfer liability under §107(a) away from a responsible party. §9607(e)(1) (emphasis added). Courts have repeatedly held that one of the

14 Letter of David Frank, Esq. to James Pedri dated April 28, 2005.

primary objectives of CERCLA is to require responsible parties to bear the cost of remedying the conditions they created. Wiegmann & Rose International Corp. v. NL Industries (N.D. Cal. 1990) 735 F.Supp. 957, 961. "A defendant cannot escape generator liability simply because it does not choose the ultimate destination of its waste. Pakootas v. Teck Cominco Metals, Ltd. (E.D. Wash. 2004) 59 ERC (BNA) 1870; citing Acme Printing, Inc. Co. v. Menard (E.D. Wis. 1995) 881 F.Supp. 1237, 1250 (emphasis added). "Furthermore, arranger liability 'may attach even though the defendant did not know the substances would be deposited at a particular site or in fact believed they would be deposited elsewhere.'" Id., citing Pierson Sand & Gravel, Inc. v. Pierson Township (W.D. Mich. 1994) 851 F.Supp. 850, 855 (emphasis added).

"Even if the disposal companies hired by the (county garbage disposal districts) were independent contractors, that fact does not affect the possible liability of the county defendants under CERCLA. As pointed out in Bliss, the structure of CERCLA rejects the county defendant's independent contractor argument. Section 107(a) imposes liability on those who arrange for disposal through "contract agreement or otherwise". Creating an exemption for independent contractors would eviscerate §107(a)(3) by placing many contractual arrangements outside that section's "contract agreement or otherwise" language. Transportation Leasing Co. v. California (C.D. Cal. 1992) 861 F.Supp. 931, 955.

Under California State law, Water Code Section 13304(a) imposes liability on anyone who causes or permits a discharge or deposit of wastes. This includes discharges of wastes to land.¹⁵ Even a relatively minor contribution to a discharge may support a finding of responsibility. City of Modesto Redevelopment Agency, et al. v. Superior Court (2004) 119 Cal.App.4th 28, 41. Further, the statute must be construed in light of common law principles of nuisance, and any party or parties who "create or assist in (the creation of a nuisance) are responsible for the ensuing damages." Mangini v. Aerojet General Corp. (1991) 230 Cal.App.3d 1125, 1137. Here, the City of Chico's contribution to the discharge was substantial and it played a significant role in the creation of the condition requiring remediation, making it liable to Mrs. Drake for the ensuing damages, its contractual agreements with Baldwin Construction notwithstanding. Certainly, the City of Chico knew or should have known that the site was an old landfill and as such should have taken appropriate precautions.¹⁶ Therefore, the extent to which the City of Chico's contract with Baldwin Construction and/or its release with Ed Simmons were agreements made with the object to exempt the City of Chico from a violation of law, namely an unlawful discharge, these were void as in violation of California Civil Code Section 1668. "One cannot contract away his liability to third parties for his own active negligence." Barkett v. Brucato (1953) 112 Cal.App.2d 264, 277-278.

15 Resolution No. 92-49 State Water Resources Control Board Resolution 21.

16 Letter of Thomas L. Hill to Fred Davis, City of Chico, dated January 22, 1988, page. 2.

It should also be noted that despite its protestations of innocence and the lack of any evidence, the City of Chico has also made offers to settle. "The City would be willing to pay up to \$150,000 to help resolve the matter and ensure that the site is cleaned up."¹⁷ In the alternative, the City has offered to allow Mrs. Drake to move the soils from the Stock Pond Levee and Battery Breaker parcels to the cell on the property known as the Scott parcel owned by the Chico Redevelopment Agency.¹⁸ However, these offers have all been made contingent upon full and complete releases and with no other financial participation or compensation for potential future liability, which of course Mrs. Drake is expected to assume. Mrs. Drake has rejected these offers.

The obvious point is made in the ACL Complaints that the City of Chico is not an "owner" of either of the two parcels in question and therefore as such cannot conduct a cleanup. However, the Board should also consider that the City of Chico has never requested permission from the property owners to remediate the sites or enter upon either of the two parcels for any cleanup-related activities relating to these properties.

The City of Chico also contends that it is a victim of reliance upon Mrs. Drake's actions, taken under the "apparent authority" of the other parcel owners to complete the remediation in a timely manner and without the involvement of the City.¹⁹ Again however, to allow the City of Chico to escape liability for any fines on the basis of such alleged reliance and to essentially ratify the City's failures to take any action would set a very dangerous precedent and would encourage others to violate future orders and the water quality laws and regulations of the State in a manner inconsistent with the Water Quality Enforcement Policy of the State Board.²⁰ The Board should seriously consider the effects of a policy which provides that as among responsible parties, the first person to step forward to take action "assumes responsibility" for the cleanup on behalf of the others, and could be subject, by herself, to fines. Who would ever be the first to step forward under such circumstances?

Finally, Mrs. Drake has raised the question many times and in more than one forum as to why the original CAO (88-700) has not been enforced as against the City of Chico. Mrs. Drake made several requests of Board staff and its counsel concerning this matter and her requests went

17 Letter of Thomas J. Lando to Virginia Drake and Rene Vercruysen dated September 10, 2004.

18 Letter of David Frank, Esq. to K. Greg Peterson, Esq. dated December 16, 2004.

19 Letter of David Frank, Esq. to James C. Pedri dated April 28, 2005, p. 4.

20 See Section E., Other Factors, p. 38, State Water Quality Resources Control Board, Water Quality Enforcement Policy dated February 19, 2002.

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unanswered.²¹ Not until Mrs. Drake went before the State Board in person on June 23, 2005, did she finally receive a response of some sort concerning the Board's apparent reluctance to enforce CAO 88-700 against the City of Chico. In your letter to her dated August 5, 2005, you indicate the matter of the further enforcement of CAO 88-700 is still "pending investigation". Exactly what is left to investigate we do not understand, and Mrs. Drake does not believe that this an adequate response to her inquiry given that the parties were to be, under the Board's own directives, completed with the cleanup by late August of 2005 when the nearby Jr. High School started. As we understand it, the City of Chico was even given until October 15, 2005, to complete its cleanup activities but has as of yet failed to do so.

For the above-stated reasons, the remarkable statement in paragraph 27 of ACL Complaint No. R5-2005-0525 that the City of Chico is "not considered (a responsible party) for Area 8 wastes and (is) not required to excavate and remove the waste" appears arbitrary and unwarranted, in that it is not supported by the record. Clearly the City of Chico should be required to comply with the Board's CAOs concerning the Stock Pond Levee parcel.

The Fines Should Be Reduced.

In consideration of the above-referenced information and based upon the following discussion of the State Board's policy, Mrs. Drake believes the amount of the fines under the ACL Complaints at issue are excessive and should be reduced. According to the formula set forth in the Water Quality Enforcement Policy Statement, consideration of the factors the Board is to use in arriving at the amount of any fines, if such are to be assessed against Mrs. Drake alone, should yield much lower amounts.

First, the ACL Complaints involve non-discharge violations, so while the Board may consider the factors used in the context of a discharge-i.e., the nature, circumstances, extent and gravity of violation, the degree of toxicity of the discharge and the susceptibility of the discharge to cleanup or abatement - since there were no discharges in connection with the fines in question, these issues are largely superfluous. Concerning what impact the violations may have on the Board's ability to effectively administer its water quality programs, etc., the violations really arise out of a disagreement among the three affected groups of the Responsible Parties and should therefore be assessed against the three groups accordingly. None of these factors are identified in the ACL Complaints as a basis for fines in any event.

Nevertheless, adjusting the amount for the alleged discharger's conduct again mitigates strongly in favor of Mrs. Drake. She has no prior history of violations and is the least culpable of all of the Responsible Parties under the CAOs for the reasons already stated. Lastly, she has undergone

21 Virginia Drake memorandum to Frances McChesney, Esq. dated May 28, 2004; Virginia Drake letter to Thomas Pinkos dated June 4, 2004.

extensive voluntary cleanup efforts by her engagement (alone) in the process that resulted in a certified EIR, a final RAP, an approved RDIP, and got the projects to the point of permitting on both parcels. The other Responsible Parties played no role in this process, whatsoever.

Concerning economic benefit, Mrs. Drake did not derive any savings from the alleged violations through delayed costs or avoided costs, as she has indicated in her declaration. Moreover, there is no showing in the ACL Complaints as to how fines in the collective amount of \$225,000 were calculated or upon what they may have been based. The fines are certainly very significant for a non-discharge situation against an individual land owner, and clearly should be modified to something much closer to the statutory minimums under the present circumstances.

Conclusion.

As recently as late March of this year, Mrs. Drake understood that the Board would hold all of the Responsible Parties accountable, including the Simmonses and the City of Chico, and that all parties would face fines if a cooperative agreement for remediation of the contamination was not reached.²² Indeed, the Board staff indicated that all Responsible Parties were in violation of the CAOs and would be subject to fines if the cleanup was not done in a timely manner.²³ Mrs. Drake left a meeting with Board Staff on March 10, 2005, having communicated that she would not be proceeding to conduct a cleanup on her own unless the other parties joined her - so the question has to be asked at this point, and in light of the understandings stated, what has happened since the end of March to make Mrs. Drake the sole focus of the Board for purposes of violations of the outstanding CAOs?

Mrs. Drake certainly has her own suspicions concerning the reasons of certain members of the Board staff for singling her out for punishment by fining her alone and letting the other Responsible Parties walk free. Clearly however, aside from these issues, the record does not support fining her alone.

For the foregoing reasons, we respectfully request that the ACL Complaints be modified, at the very minimum, to add the City of Chico and the Simmonses as parties and to make them liable for any fines being imposed. Additionally, the amounts of the fines should be reduced again for the foregoing reasons and should be something closer to the statutory minimum amounts, as a collective \$225,000 fine against an individual in a non-discharge setting, with no prior violations, a history of voluntary cooperation, and little or no culpability merits such an outcome.

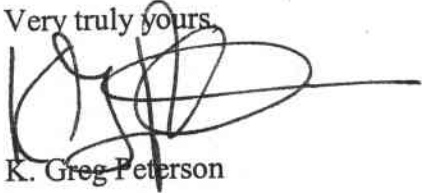
22 Letter of K. Greg Peterson, Esq. to James Pedri dated March 23, 2005.

23 Letter of Karen Clementsen to Responsible Parties dated March 28, 2005.

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Thank you for your consideration of these matters and if you have any questions, please contact me.

Very truly yours,

A handwritten signature in black ink, appearing to be "K. Greg Peterson", with a long horizontal line extending to the right.

K. Greg Peterson

KGP/las

cc: Virginia L. Drake (w/encls.)

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10 Attorneys for VIRGINIA L. DRAKE, Trustee, DRAKE REVOCABLE TRUST

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12 CENTRAL VALLEY REGION

13 In re: VIRGINIA L. DRAKE, TRUSTEE,)	WRITTEN RESPONSE TO
14 DRAKE REVOCABLE TRUST)	ADMINISTRATIVE CIVIL LIABILITY
15 1) HUMBOLDT ROAD BURN)	COMPLAINT NO. R5-2005-0524 AND
16 DUMP AREA 7, APN 011-780-018,)	ADMINISTRATIVE CIVIL LIABILITY
17 BUTTE COUNTY; and)	COMPLAINT NO. R5-2005-0525
18 2) HUMBOLDT ROAD BURN)	DECLARATION OF VIRGINIA L. DRAKE
19 DUMP AREA 8, APN 011-780-014,)	
20 BUTTE COUNTY)	

21 I, VIRGINIA L. DRAKE, declare as follows,

22 1. I am the party identified in both of the above-referenced Administrative Civil
23 Liability Complaints ("ACL Complaints") and I am the Trustee of the Drake Revocable Trust,
24 the part owner of both properties in question.

25 2. I make this declaration based upon information that is personally known to me,
26 except where stated as on the basis of my information and belief, and as to those matters I am
27 informed and believe that the same are true and correct to the best of my knowledge. If called
28 upon as a witness, I could and would competently testify to the same of my own personal
knowledge.

3. In March of 1978, my late husband, John Drake, purchased a 1/4 undivided
interest in a 7000 acre assemblage of properties then known as the Simmons Ranch, which
included the properties at issue in the ACL Complaints which are now referred to as the Stock
Pond Levee parcel (Area 8; APN: 011-780-014) and the Battery Breaker parcel (Area 7; APN:

1 011-780-018). My husband later acquired (I believe in October of 1983) an additional 1/4
2 undivided interest in the Simmons Ranch properties.

3 4. I married John Drake in June of 2000.

4 5. In February of 2001, John Drake transferred his interest in both properties to me
5 and himself in our capacities as Trustees of the Drake Revocable Trust. My husband then passed
6 away in November of 2001, and it is in my capacity as Trustee of the Drake Revocable Trust that
7 I now hold title to an undivided 50% interest in the Battery Breaker and Stock Pond Levee
8 parcels.

9 6. The Simmons brothers - James E. (Ed) and Darwin - acquired their interests in the
10 in the Battery Breaker and Stock Pond Levee parcels from the estate of their mother. I am
11 informed and believe that Ed, on the one hand, and Darwin and Nina as trustees of the Simmons
12 Family Trust, on the other hand, each currently own a 1/4 undivided interest in the Battery
13 Breaker and Stock Pond Levee parcels.

14 7. I am informed and believe that the only use the two properties have been put to
15 that I know of is grazing of horses by Ed Simmons prior to the time that the State required that
16 we fence off the Battery Breaker and Stock Pond Levee parcels. The fencing and posting of
17 Areas 7 and 8 was completed some time before June 1, 2001

18 8. I am currently in litigation with the Simmonses insofar as the parties no longer
19 wish to co-own the various properties that comprise the remaining balance of the Simmons
20 Ranch, and including the Battery Breaker and Stock Pond Levee parcels. The Declaration of
21 Kenneth R. Stone, Esq. which is being included with my written response, sets forth most of the
22 relevant details concerning the Partition Action I have filed against the Simmonses. However, I
23 want to emphasize that there have been no agreements reached between myself and the
24 Simmonses, by way of partial or final settlement, concerning any of the matters relating to the
25 properties, and specifically including the remediation and cleanup of the Battery Breaker and
26 Stock Pond Levee parcels. These issues are included in the Partition Action and we have not
27 been able to agree on anything.

28

1 9. I have never been authorized by the Simmonses to conduct a cleanup of either the
2 Battery Breaker or Stock Pond Levee parcels, nor have I ever represented myself as such to the
3 Board or Board staff. Specifically, I have never verbally told anyone on the Board staff that I
4 was authorized to act on the Simmonses behalf, and in fact what I have told the Board staff is
5 that I have had great difficulty with the Simmons brothers who they know I am currently in
6 litigation with. What I have done in this matter is attempt to conduct myself in a reasonable and
7 prudent manner that I had hoped would be viewed as an attempt to cooperate with the Board and
8 its staff, since I could not secure the cooperation (financially or otherwise) of my co-owners, the
9 Simmonses, to do something instead of nothing concerning the investigation and remediation of
10 the alleged contamination. I felt that as a co-tenant with the Simmonses, I had the individual
11 right to take action to maintain and repair my properties, and that I could later hold the
12 Simmonses financially liable for whatever costs I might have incurred in that effort. It never
13 occurred to me that by taking this action I would be exposing myself personally to fines, and at
14 the same time completely insulating the Simmons brothers and City of Chico from fines for their
15 various violations of the Cleanup and Abatement Orders and failures to take any action
16 whatsoever. Although I have made repeated requests, the Simmonses and City of Chico have
17 never offered to take any action to investigate or cleanup either the Battery Breaker or Stock
18 Pond Levee parcels, and I have certainly never prevented them from doing so in any respect.

19 10. Additionally, the Simmonses have never offered "full costs reimbursement" as to
20 anything that we could agree on in terms of a remediation plan or a cleanup of either of the
21 parcels. The Simmonses' last minute offer to participate financially with respect to Alternatives
22 1 and 2 (when they knew that I was only in favor of Alternative 3), made in June or July of
23 2005, was merely a spiteful attempt to make it appear as though I was not acting reasonably in
24 my efforts to remediate the alleged contamination. More importantly, their words were certainly
25 never followed up with anything in terms of action or money to pay for the significant costs I
26 have in fact incurred responding to the Board's Cleanup and Abatement Orders ("CAOs").

27 11. For example, Ed Simmons agreed to accept financial responsibility for the Stock
28 Pond Levee parcel back in 1994. However, after my husband died in late 2001, and the Board

1 renewed its interest in pursuing remediation and cleanup of the two parcels, I could no longer
2 secure Ed Simmons' cooperation pursuant to any of his earlier verbal or written agreements. I
3 have made numerous oral and written demands, both directly and through my counsel, for the
4 Simmonses to cooperate with me concerning payment of the ongoing expenses that I have
5 incurred in my efforts to investigate and remediate the alleged contamination. Neither of the
6 Simmonses has ever responded in a satisfactory manner to any of my requests in this regard.
7 Furthermore, I have incurred and paid approximately \$186,000.00 in such expenses at this point
8 (since 2004) and the Simmonses have not repaid me one dime for any portion of this sum. A
9 breakdown of the costs I have incurred and paid is attached hereto as Exhibit "A."

10 12. Although I am the only party being fined at this point, in part for failing to pay an
11 invoice, I am the only Responsible Party under either of the CAOs who has paid any of the
12 oversight reimbursement costs.

13 13. As part of my investigation, I retained Risk-Based Decisions, Inc. ("RBD") to
14 determine how much soil was actually contaminated and would therefore have to be removed.
15 RBD submitted its report to the Board in mid-February of 2005 which contains an analysis
16 establishing conclusively that the soils that comprise the Stock Pond Levee parcel, which include
17 the lead contaminated soils, came from Area 2-the area where the Bruce Road extension
18 excavation took place in 1987, which property was owned by the City of Chico at the time. I am
19 at a loss to explain why this report and its contents are not mentioned in either of the ACL
20 Complaints.

21 14. After the trial next year (February 16, 2006) in the Partition Action, I anticipate
22 that we will have an interlocutory judgment from the Butte County Superior Court that will
23 provide direction to both the Simmonses and me as to exactly how and when the cleanup will
24 occur, and who will be liable for the costs of the same. It is my contention that, as between the
25 Drake Trust and Ed Simmons concerning Area 8, for example, that Ed Simmons is 100%
26 financially and legally responsible and that I should have no liability. If this turns out to be the
27 case, then it would hardly be fair or equitable for me to be the only party taking action at this
28 point and getting fined for it, while Ed Simmons does nothing and is later found to be

1 individually liable for being the one who caused the contamination, at least as between the
2 owners. I certainly believe that this will be the case because, as I have already indicated in this
3 Declaration, he has admitted this in the past, in writing.

4 15. I have included in the Compendium of Relevant Documents submitted with my
5 written comments, a memorandum from my late husband's files dated February 4, 1988, a
6 Settlement Agreement entered into between my late husband and Ed Simmons dated June 3,
7 1994, and a subsequent agreement dated August 1, 1995, all of which document Ed Simmons'
8 taking full personal responsibility in writing, as between the property owners for having caused
9 the contaminated soil to be placed on the Stock Pond Levee parcel by the City of Chico and its
10 contractor, Baldwin Contracting Company.

11 16. I do not believe that there is any risk of a discharge or further discharge from
12 either of the two parcels between now and the date the Partition Action goes to trial, given the
13 condition of the property and its state of non-use. Furthermore, and to my knowledge, there have
14 been no releases or discharges of any of the alleged contaminants on my property to any waters
15 of the State.

16 17. But for the City of Chico's contaminated fill dirt excavated from the Bruce Road
17 extension that was deposited on the Stock Pond Levee parcel in late 1987, and a battery recycling
18 operation on the Battery Breaker parcel which apparently concluded its operations long before
19 my late husband acquired his initial interest in the properties back in 1978, I am unaware of any
20 other discharges of possible hazardous wastes on my property, and I do not know how they
21 would otherwise possibly have come to be deposited on the two properties in question.

22 18. The City of Chico has consistently argued that it is not liable to me for causing its
23 contaminated waste to be placed on the Stock Pond Levee parcel based principally upon its
24 contract with Baldwin Contracting Company, and its three sentence release with Ed Simmons.
25 Neither my late husband nor I have ever signed any agreement with the City of Chico transferring
26 liability for this waste, and in fact neither of us was aware of the waste until it was already in
27 place. Ed Simmons was certainly not authorized to release liability on behalf of my husband or
28 me in connection with the City of Chico or Baldwin Contracting Company's actions. By in

1 essence adopting the City of Chico's position that it is "not responsible" for cleaning up the
2 contaminated waste on the Stock Pond Levee parcel, the Board staff is essentially releasing the
3 City from its legal, financial and, I believe, moral obligations to clean up my property and
4 remediate the existing contamination caused by its own fill dirt.

5 19. Reference is made in the ACL Complaints to the fact that the Chico
6 Redevelopment Agency's ("CRA") request to enter upon my properties to do certain air
7 monitoring was denied by me, and that this is in some way a reason to impose fines against me.
8 First, as I understood it, this activity had nothing to do with the City of Chico, or more
9 specifically, anything to do with remediation of the contamination on my properties. Second, I
10 came to learn much later but was never specifically told, that Board staff had made it known that
11 I had better cooperate with the CRA concerning its air monitoring or I would face fines for
12 failing to do so. None of the Board staff ever mentioned the latter issue to me at the time.

13 20. The record I have presented should reflect my voluntary efforts to affect a
14 cleanup. I have no previous history of violations.

15 21. Although a summary reference is made in the ACL Complaints to "consideration
16 of economic benefit or savings resulting from the violations" I have not realized any savings or
17 monetary gain from the alleged acts constituting violations, as detailed in the ACL Complaints.
18 Specifically, no improvements to a treatment system, plant upgrades, capital improvements, etc.,
19 have been postponed, since all we are dealing with is raw land that at best threatens a possible
20 discharge of lead or some type of other contaminant at some point in the future. There are really
21 no "delayed costs" and there are certainly no "avoided costs" as I understand the use of these
22 terms by the State Board. As long as the property is left alone, as is the plan until there is a full
23 cleanup, there should be no discharges.

24 22. I am not asking at this time to be exonerated of liability for the cleanup or from
25 reasonable fines. However, I certainly feel that as between Ed Simmons, the City of Chico and
26 me, I am the least culpable party in terms of legal responsibility for the cleanup of the Stock Pond
27 Levee parcel, and as between the Simmonses and me, similarly with respect to the Battery
28

1 Breaker parcel. Yet, it seems as though I am being singled out for punishment since I am the
2 only party who is being fined.

3 23. I have searched for reasons to explain why the Board staff is singling me out for
4 punishment, and the only conclusion I can come to is that these are the arbitrary and capricious
5 acts of certain members of the Board staff.

6 24. For example, I have made several written requests of certain members of the
7 Board staff who are the same persons involved in my investigation and are now imposing fines
8 against me. I have previously asked them to explain to me why enforcement of CAO 88-700 has
9 not been pursued against the City of Chico, and I have never received an answer. I have also
10 requested a variety of different documents from the Board staff and was never told of their
11 existence nor voluntarily provided with copies of the same until I drove to the Board's offices in
12 Redding, reviewed the file and copied them for myself. I have consistently been treated in a very
13 hostile manner.

14 25. At least one member of the Board staff (Jim Pedri) has also exhibited a highly
15 unusual, personal interest in me, and has made several inappropriate comments to others about
16 me, which may suggest his reasons for wanting to punish me by leveling fines against me, alone.
17 First, I should confirm that I have an intimate, personal relationship with a member of the Board
18 staff named Phil Woodward. This has been known to the Board staff for quite some period of
19 time and Mr. Woodward is not involved with the investigation of my properties and does not
20 have any role to play in the Board's communications with me concerning this matter.
21 Furthermore, I have avoided asking him any questions or asking him to perform any acts on my
22 behalf in connection with my communications with the Board staff concerning these matters.
23 Nevertheless, Mr. Pedri has persisted in attempting to question Mr. Woodward about me
24 regarding, for example and most concerning to me, where I live, what my home is like, etc. Mr.
25 Pedri has also ridiculed Mr. Woodward by making him aware of the fact that I was the only
26 person being fined and asking in front of other staff members "Is Ginger done screaming yet?"
27 about the Board's actions. I have also been treated in an undignified and unjust manner in terms
28 of my recent communications with Board staff who have essentially accused Mr. Woodward of

1 inappropriately obtaining confidential information on my behalf, which he has not done at any
2 time.

3 26. In essence, my sense from reading the ACL Complaints is that certain members of
4 the Board staff have gone out of their way to avoid fining any of the other Responsible Parties,
5 and have instead explained away the liability of these other Responsible Parties and have leveled
6 fines against me alone for reasons that cannot have anything to do with the good faith efforts I
7 have taken up to this point in time to try and do something to remediate the contamination. The
8 fact that I have not cleaned up both properties is unfortunately true, but it is not my fault, alone.

9 27. At a minimum, I believe there is just and good cause for the Simmonses and the
10 City of Chico to be added to the ACL Complaints as dischargers and to be held jointly and
11 severally liable for the fines being imposed as a result of the alleged violations of the CAOs in
12 question. I also believe the amount of the fines is excessive and should be reduced.

13 I declare under penalty of perjury of the laws of the State of California that the foregoing
14 is true and correct and that this declaration was executed this 26th day of OCTOBER,
15 2005, at Chico, California.

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18 Virginia L. Drake
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Exhibit "A"

Humboldt Road Burn Dump costs from 2004 through October 10, 2005

Law Offices of K. Greg Peterson - Legal Counsel for Water Board compliance/remediation	\$57,333.74
Risk-Based Decisions, Inc. - consulting/field sampling and analysis/preparation of RDIP	\$119,160.92
Rolls Anderson Rolls - Engineering fees	\$776.50
Vestra Consultants - environmental consultants	\$325.00
State Water Quality Resources Board - oversight cost reimbursement	\$734.36
Butte County Air Quality Management District - permit fee	\$106.56
Foothill Associates - consultant/404 permit and compliance	<u>\$7,563.41</u>
TOTAL	\$186,000.49

1 K. GREG PETERSON, ESQ. (SBN: 118287)
JAMES A. CLINCHARD, ESQ. (SBN: 200746)
2 LAW OFFICES OF K. GREG PETERSON
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5 jim@kgregpeterson.com

6 Attorneys for VIRGINIA L. DRAKE, Trustee, DRAKE REVOCABLE TRUST

7
8 CALIFORNIA REGIONAL WATER CONTROL BOARD
9 CENTRAL VALLEY REGION

10 In re: VIRGINAL L. DRAKE, TRUSTEE,) WRITTEN RESPONSE TO
11 DRAKE REVOCABLE TRUST) ADMINISTRATIVE CIVIL LIABILITY
12 1) HUMBOLDT ROAD BURN) COMPLAINT NO. R5-2005-0524 AND
DUMP AREA 7, APN 011-780-018,) ADMINISTRATIVE CIVIL LIABILITY
13 BUTTE COUNTY; and) COMPLAINT NO. R5-2005-0525
14 2) HUMBOLDT ROAD BURN) DECLARATION OF KENNETH R. STONE,
DUMP AREA 8, APN 011-780-014,) ESQ.
15 BUTTE COUNTY)
16

17 I, KENNETH R. STONE, declare as follows,

18 1. I am an attorney at law duly licensed to practice in all the courts in the State of
19 California and I am making this declaration in support of the position of Virginia L. Drake,
20 Trustee, Drake Revocable Trust, in response to the above-referenced Administrative Civil
21 Liability Complaints.

22 2. I make this declaration based upon information that is personally known to me,
23 except where stated as on the basis of my information and belief, and as to those matters I am
24 informed and believe that the same are true and correct to the best of my knowledge. If called
25 upon as a witness, I could and would competently testify to the same of my own personal
26 knowledge .

27 3. I am currently the counsel of record for Virginia L. Drake, Trustee of the Drake
28 Revocable Trust ("Drake Trust") in the matter known as Virginia L. Drake, Trustee, Drake
Revocable Trust v. James Edward Simmons, et al., Butte County Superior Court case no. 129127

1 (the "Partition Action") wherein the Drake Trust is both the Plaintiff and Cross-defendant. The
2 Defendants and Cross-complainants are James Edward Simmons and Jean Simmons, and Darwin
3 Harrold Simmons and Nina Rae Simmons, as Co-trustees of the Simmons Family Trust
4 (collectively the "Simmonses").

5 4. The subject matter of the Partition Action involves the partition and sale of a
6 number of large pieces of real property in the Chico area which are co-owned by the Drake Trust
7 and the Simmonses. These properties include the so-called "Stock Pond Levee" parcel (Area 8;
8 APN 011-780-014) and the "Battery Breaker" parcel (Area 7; APN 011-780-018). The matters at
9 issue in the Partition Action involve not only the sale of the various parcels by the parties and the
10 division of the sale proceeds according to their interests, but also claims for reimbursement of
11 costs and expenses associated with the ownership, maintenance and repair of the various
12 properties. In the case of the Stock Pond Levee and Battery Breaker parcels, the Drake Trust is
13 seeking reimbursement of and/or indemnification for response costs, investigation and cleanup
14 costs to remediate the lead and other hazardous waste contamination of these parcels.

15 5. I have attached to my declaration as Exhibit "A" a true and correct copy of a letter
16 I recently received in the Partition Action from the Simmons' counsel, Randall C. Nelson,
17 Esq., dated August 1, 2005. As can be seen from this letter, as of August of 2005 the parties
18 were still attempting to pursue a resolution of the matters at issue in the Partition Action. This
19 circumstance continues to this very day, as there is no agreement in place concerning the sale
20 and/or management of the properties which form the basis of the dispute in the Partition Action.
21 Even as to the listing and sale of the parcels other than the contaminated parcels (the Stock Pond
22 Levee and Battery Breaker parcels), which is generally considered the aspect of the Partition
23 Action which is more capable of resolution, settlement has thus far proven elusive.

24 6. Over the last year and a half to two years, the parties have attempted to negotiate a
25 resolution of the Partition Action, including reimbursement of the response costs, responsibility
26 for conducting the cleanup and dividing up the financial responsibility for the same in relation to
27 the contaminated parcels. After two (2) mediations and three (3) settlement conferences in front
28 of various different judges, no agreement exists at this time concerning a resolution of any aspect

1 of these disagreements. Furthermore, and in my view, the Simmonses have approached
2 settlement in this matter in a very difficult and nonbusiness-like manner which has needlessly
3 increased the litigation costs and delay in resolving the disputes between the parties.

4 7. Currently there is a trial date in the Partition Action set for February 13, 2006,
5 before the Honorable Michael Kelly of the Butte County Superior Court. Barring a settlement, I
6 do not anticipate that before the Partition Action goes to trial there will be any agreements or
7 court orders respecting the obligations or responsibilities of the parties pertaining to the
8 contaminated parcels.

9 8. I am informed and believe that in connection with the above-referenced
10 Administrative Civil Liability Complaints, claims have been made that a) the Simmonses have
11 agreed to fully reimburse the Drake Trust for the response costs and clean up costs associated
12 with the Stock Pond Levee waste; b) the Simmonses have agreed with the Drake Trust to pay
13 their fair share of all cleanup costs associated with both parcels; c) the Drake Trust has assumed
14 sole responsibility for the cleanup of the Stock Pond Levee parcel on behalf of the ownership
15 group; and d) the Drake Trust has specifically been authorized by the Simmonses or has some
16 type of agreement in place with the Simmonses to conduct a cleanup of the Area 8 waste.

17 9. On the basis of my intimate knowledge of the dealings between the Drake Trust
18 and the Simmonses concerning the Battery Breaker and Stock Pond Levee parcels, which form
19 an important part of the issues in dispute in the Partition Action, I can safely state that all of the
20 propositions set forth item nos. a)-d), above, are to my knowledge absolutely false and untrue.

21 10. To the extent that the Simmonses' ability to pay for the cleanup of the
22 contaminated parcels is in question, it is my belief based on what I know from the Partition
23 Action that they have more than adequate resources to pay for the cleanup without the
24 participation of the Drake Trust, if necessary. The Simmonses collective (50%) interest in the
25 properties in the Partition Action alone is estimated to be worth more than approximately
26 \$10,000,000.

1 11. I am aware of absolutely no voluntary cleanup efforts undertaken nor costs
2 incurred and claimed by the Simmonses in the Partition Action concerning response costs,
3 investigative costs or cleanup-related costs pertaining to the two above-references properties.

4 I declare under penalty of perjury of the laws of the State of California that the foregoing
5 is true and correct and that this declaration was executed this 19th day of October,
6 2005, at Sacramento, California.

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Kenneth R. Stone, Esq.

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HENRY E. BOSE
MARK A. VEGH

FRANCIS CARR, 1876-1944
LAURENCE J. KENNEDY, 1883-1878
LAURENCE J. KENNEDY, JR., 1918-1986
LAURENCE W. CARR, 1912-1991
R. RUSSELL PETERSON, RETIRED

August 1, 2005

SENT VIA FACSIMILE

Kenneth R. Stone, Esq.
Hefner, Stark & Marois, LLP
2150 River Plaza Drive, Suite 450
Sacramento, California 95833-3883

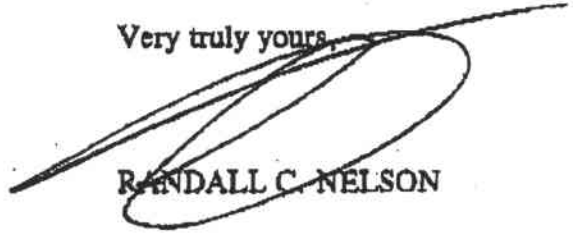
Re: Drake v. Simmons
Case No. 129127
Our File No. N-9294

Dear Ken:

We have traded phone messages over the last few weeks, but have not been able to speak with each other. My clients are eager to pursue a resolution of this matter, at least to the extent of the parcels that are not affected by the contamination. As I stated after the last court appearance, I believe that we can agree to set aside any appraisal requirement as long as we can agree on the specific parcels that will be marketed immediately. If we are going to do this, however, I would like to get it underway as soon as possible.

Please call me at your first opportunity to discuss how we can proceed. I look forward to hearing from you.

Very truly yours,


RANDALL C. NELSON

RCN:es
c.c. Mr. and Mrs. James Simmons
Mr. and Mrs. Darwin Simmons

EXHIBIT

"A"



DEPARTMENT
OF PUBLIC WORKS
ENGINEERING

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P.O. Box 3420 Fax (530) 895-4899
Chico, CA 95927 <http://www.ci.chico.ca.us>

October 24, 2005

Ms. Karen Clementsen
California Regional Water Quality Control Board
Central Valley Region
415 Knollcrest Drive, Suite 100
Redding, CA 96002

Dear Ms. Clementsen,

The following are the City of Chico's comments on the two Administrative Civil Liability complaints that the RWQCB has issued again Virginia Drake for failing to begin the cleanup on Areas 7 and 8 of the Humboldt Road Burn Dump, respectively APNs 011-780-018 and 011-790-014.

ACLC No. R5-2005-0524, Area 7 of HRBD, APN 011-780-018 (former battery breaker area)

This Complaint is for failure of Virginia L. Drake, as Trustee of the Drake Revocable Trust, to obtain regulatory permits necessary for cleanup of Area 7 waste, remove waste from Area 7, pay RWQCB oversight invoices, submit monthly status reports, submit a regulatory permitting technical report, and submit an off-site disposal alternative/revised transportation plan technical report.

General Comment: The City of Chico has never owned nor conducted operations on APN 011-780-018. The City has spent many years and millions of dollars investigating the nature and occurrence of hazardous substances related to the Humboldt Road Burn Dump, and preparing design plans for remediation, including APN 011-780-018. The current design included adequate capacity in the consolidation cell for any wastes present on APN 011-780-018. The landowner, however, failed to obtain the necessary permits to allow this waste to be removed during the timeframe consist with remediation activities conducted by the City and the Chico Redevelopment Agency. It should also be noted that the landowner denied the Chico Redevelopment Agency access to APN 011-780-018 for the placement of air monitoring equipment required by Butte County Air Quality Management District. As a result, the Chico Redevelopment Agency was required to amend its air monitoring plan and relocate the affected air monitoring station. These changes to the air monitoring plan, necessitated by the denial of access from the landowner, are documented in the administrative record available at both the Regional Water Quality Control Board office in Redding, California and the Butte County Air Quality Management District office in Chico, California.



ACLC No. R5-2005-0525, Area 8 of HRBD, APN 011-780-014 (stock pond levee area)

This Complaint is for failure of Virginia L. Drake, as Trustee of the Drake Revocable Trust, to obtain regulatory permits necessary for cleanup of Area 8 waste, remove waste from Area 8, submit monthly status reports, submit a regulatory permitting technical report, and submit an off-site disposal alternative/revised transportation plan technical report.

General Comment: The City of Chico has never owned nor conducted operations on APN 011-780-014. The City has spent many years and millions of dollars investigating the nature and occurrence of hazardous substances related to the Humboldt Road Burn Dump, and preparing design plans for remediation, including APN 011-780-014. The current design included adequate capacity in the consolidation cell for any wastes present on APN 011-780-014. The landowner, however, failed to obtain the necessary permits to allow this waste to be removed during the timeframe consist with remediation activities conducted by the City and the Chico Redevelopment Agency. It should also be noted that the landowner denied the Chico Redevelopment Agency access to APN 011-780-014 for the placement of air monitoring equipment required by Butte County Air Quality Management District. As a result, the Chico Redevelopment Agency was required to amend its air monitoring plan and relocate the affected air monitoring station. These changes to the air monitoring plan, necessitated by the denial of access from the landowner, are documented in the administrative record available at both the Regional Water Quality Control Board office in Redding, California and the Butte County Air Quality Management District office in Chico, California.

Specific Comments:

Previous Enforcement, Cleanup and Abatement Order No. 88-700, Finding No. 6 should also specify that the contract between the City and Baldwin not only specifies that disposal of surplus construction material was the responsibility of the contractor (Baldwin), but that the contractor became the owner of the surplus material.

Previous Enforcement, Cleanup and Abatement Order No. 88-700, Finding No. 7. The August 13, 1987 letter from James E. Simmons not only granted permission to Baldwin to place surplus construction material on APN 011-780-014, Mr. Simmons also specifically stated in the letter that "The City of Chico is hereby relieved of any legal responsibility associated with this permission."

Remediation of HRBD Properties, Finding No. 21. The second sentence should be corrected to show that the Certificate of Completion was issued on March 10, 2005, not March 10, 2004.

Please feel free to contact me with any questions you may have regarding our comments.

Sincerely,

A handwritten signature in black ink, appearing to be 'Fritz McKinley', written in a cursive style.

Fritz McKinley
Director of Engineering

C: Tom Lando, City Manager
Greg Jones, Assistant City Manager
David Frank, City Attorney
Andrew Kopania, EMKO Environmental